

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE EASTERN DISTRICT OF TENNESSEE AT GREENEVILLE
3 UNITED STATES OF AMERICA,

4 Plaintiff,

5
6 VS

Case No. 2:18-cr-00140

7
8 ANDREW ASSAD, ET AL,
9 Defendants.

10
11 TRANSCRIPT OF MOTION HEARING

12 April 3, 2019

13 Honorable Clifton L. Corker Presiding

14 APPEARANCES:

15 For Plaintiff: T. J. HARKER, ESQ.

16 WILLIAM ROACH, ESQ.

17 For Defendants: PAUL M. SISCO, ESQ.

18 ANN C. SHORT, ESQ.

19 RICHARD RODRIGUEZ, ESQ.

20 RACHEL MAY ZYSK, ESQ.

21 EDDIE SUAREZ, ESQ.

22 MORRIS PURCELL, JR., ESQ.

23 GREGORY W. KEHOE, ESQ.

24 DALE R. SISCO, ESQ.

25 DONALD A. BOSCH, ESQ.

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1 MS. OTTINGER: The United States District
2 Court for the Eastern District of Tennessee, the
3 Honorable Clifton L. Corker presiding, is now in
4 session. Please be seated.

5 THE COURT: All right. Good morning.

6 ALL: Good morning, Your Honor.

7 THE COURT: Do you want to call the case?

8 MS. OTTINGER: Yes, Your Honor. Case
9 Number 2:18-cr-140, the United States of America
10 versus Andrew Assad, et al.

11 THE COURT: All right. We're here today
12 on two motions, the joint motion for a Bill of
13 Particulars and the Motion to Strike the Surplusage
14 in the indictment, and I guess it's the defendant's
15 motion to -- who wants to -- do all of you all want
16 to argue the case, or who wants to go first as far as
17 the defendants?

18 MR. FOSTER: Sir, my name is Todd Foster.
19 I'd like to go first. I believe other counsel have
20 arguments to make as well.

21 THE COURT: Oh, that is absolutely fine.

22 MR. KEHOE: Yes, Your Honor. I'm Greg
23 Kehoe. I represent Myers, Smith, Alpha-Omega,
24 Germaine, Zoetic, Tanith and ULD, and I'll be
25 offering for those.

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1 THE COURT: Okay. That's not a problem at
2 all, and I'm happy to have all of you if you want to
3 to argue as well after Mr. -- is it Mr. Sisco?

4 MR. FOSTER: Foster.

5 MR. PAUL SISCO: Yes, Sir.

6 THE COURT: Okay. Mr. Sisco is on the
7 phone. Is that right?

8 MR. DALE SISCO: There's two of us, Judge.

9 THE COURT: All right.

10 MR. DALE SISCO: Dale Sisco is on the
11 phone. I represent Alpha-Omega Pharmacy, Germaine
12 Pharmacy and Zoetic Pharmacy.

13 THE COURT: Okay. And, Mr. Foster, you're
14 representing Peter Bolos?

15 MR. FOSTER: Yes, Sir.

16 THE COURT: Okay. That's why I've got my
17 thing screwed up here. Okay.

18 MR. PAUL SISCO: And, Your Honor, just to
19 be clear, I'm the other Sisco, Paul Sisco for Andrew
20 Assad.

21 THE COURT: Okay. All right.

22 MR. PAUL SISCO: Thank you.

23 THE COURT: All right. Well, Mr. Foster,
24 do you want, do you want to be heard?

25 MR. FOSTER: Yes, I do. Good morning

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1 again, Judge.

2 THE COURT: Good morning.

3 MR. FOSTER: Well, Judge, in regard to the
4 Motion for the Bill of Particulars, we all understand
5 that it's fairly commonplace for as many lawyers and
6 defendants in many cases, but this case is a little
7 different. Actually, it's a lot different, and I
8 think that the circumstances of this case are more
9 compelling for the relief that we're requesting. I'd
10 like to discuss for a few minutes why I think that is
11 the case.

12 Of course, the standard for the Court to
13 apply in deciding whether or not to grant the Bill of
14 Particulars is whether or not it is necessary in
15 order to avoid surprise for the defendants, for the
16 defendants to be surprised if they are not provided
17 with the additional information, the detail of the
18 proceeding, the specifics that they seek. And in a
19 case like this with this indictment with the way that
20 this case is tried, plainly, plainly, I believe that
21 we are entitled to that. Well, Sir, if we go through
22 the indictment, we don't have to go very far really
23 to make a point. If we go to Paragraph 1 of the
24 indictment on the second page, the first thing that
25 strikes me, jumps out at me is that the indictment

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1 alleges that there are people, the defendants and
2 others known, persons and entities known to the grand
3 jury that are not charged therein. That's not just
4 people. He's not talking about -- the grand jury is
5 not only talking about unindicted co-conspirators,
6 which heretofore the government has not disclosed to
7 us, they're talking about uncharged entities,
8 unnamed, unnamed. So, of course, when we talk about
9 unindicted co-conspirators, there is a whole body of
10 dangerous evidence that comes in from that type of
11 charging language. So we could go to trial, and an
12 unindicted co-conspirator, co-conspirator's statement
13 is offered into evidence, and it's like finding Mr.
14 Bolos who like, "Who's that? We've never heard of
15 this person." Of course, under the rule, 806 for
16 example, Federal Rule 806, we're entitled to present
17 evidence to impeach the credibility of the
18 co-conspirator declarant, but if we don't know who
19 the co-conspirator declarant is, how can we prepare
20 to impeach him or her? So we need to know that
21 unless the government is going to take the position,
22 and I don't expect they will, that they don't intend
23 to offer co-conspirator testimony, co-conspirator
24 hearsay testimony, then I think we need to know that.
25 We need to know who these co-conspirators are,

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1 and we need to know in advance of the trial, far in
2 advance of the trial, and we need to know who these
3 unindicted entities are also. Because as we go
4 further into the charging language of this document,
5 Judge -- if they're relying on Page 2, it says that
6 "The conspiracy was to deceive tens of thousands of
7 patients," tens of thousands of the patients. And in
8 the trial, of course, the Court instructs the jury
9 that if you find that the defendant acting in
10 furtherance of the conspiracy on only one occasion,
11 you may find that person guilty of conspiracy.

12 So here we're getting some vague indication
13 that there are tens of thousands of patient claims
14 which were within the possession and control of the
15 government, and we don't know. Are they going to put
16 in Number 5, 10, 25, 1,050? We need to know which
17 specific claims they say are fraudulent so that we
18 can prepare the defendant. How can we defend -- how
19 can we prepare to proceed with it? How could we
20 conceivably prepare to defend against tens of
21 thousands of patient claims? We just can't. And
22 even if the government would say, "Okay, Little
23 Defense. Here they are. We've provided you. Here's
24 50,000 patient claims. You've got them there."
25 Well, okay. Which ones do you intend to use? Which

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1 ones do you intend to prove because the cases talk
2 about that, and some of the cases which were cited
3 within the pleadings say that in instances where
4 there's like very, very broad discovery, we're more
5 entitled to a Bill of Particulars because how do you
6 pick and choose? You have 25,000 patient claims
7 there. The government has to tell us. "Okay. We'll
8 get this one, this one" or some range. We're
9 entitled to some notice so that we can prepare so
10 we're not surprised when we get to court and say,
11 "Oh, my gosh. What is this?" Entities. What
12 entities? What are the other entities known to the
13 grand jury which are not charged herein?

14 Well, anyway, the government knows who
15 these -- or what these entities and who these people
16 are because it says "known to the grand jury." So
17 there's a list somewhere in the government's office
18 where, "Okay. These are the unindicted
19 co-conspirators," or "These are the entities which we
20 think were involved in the trial, but we're not going
21 to list any of them." Okay. Well, if you plead them
22 -- it seems to me, if you plead them, you intend to
23 prove them. So if you intend to prove them, we
24 should be entitled to notice and the opportunity to
25 prepare and there's no prejudicial surprise at the

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1 trial. Now if the government says, "Listen, we're
2 not going to prove any of that," that's another
3 story.

4 THE COURT: What do you make of their
5 response that, you know, they have been basically
6 holding back by giving you all this discovery that
7 addresses your concern that you're raising right here
8 about unnamed entities and whatnot and the claims
9 that they intend to prove?

10 MR. FOSTER: Well, it's in this mass of
11 these -- I don't have any documents, a million
12 documents or we have thousands of recordings. So
13 just because it's in this haystack of information
14 doesn't mean that we could reasonably and effectively
15 go through and prepare.

16 THE COURT: Why is that? I mean if that's
17 what they're saying, this is their case.

18 MR. FOSTER: Yeah.

19 THE COURT: I mean if they're saying this
20 is the evidence, and we didn't -- the volume of it is
21 enormous. I can see that. And if they say -- if the
22 response is, "Well, here is the discovery. Here are
23 the other entities, and here's the manner of this
24 conspiracy, and we're giving you all these documents
25 that prove what we're trying to -- what we've alleged

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1 in the indictment," does that not, does that not
2 answer some of your issues, or does it not?

3 MR. FOSTER: It's a step, but I think we've
4 done some narrowing down.

5 THE COURT: So I guess that's the real
6 question, is do you want by the Bill of Particulars,
7 want me to tell them, "All right. I know you've
8 given them a vast universe of information. Now I
9 want you to narrow it down to what are you actually
10 going use at trial?" So you actually...

11 MR. FOSTER: What are you actually going to
12 use at trial, who are the unindicted co-conspirators?

13 THE COURT: Okay.

14 MR. FOSTER: All right. You've alleged,
15 and we're going to talk about the evidence, and we'll
16 bring it up, and the jury can, the jury can convict
17 people based upon a co-conspirator's statements. So
18 somebody could take the witness stand and say, "Oh,
19 yeah. I know Peter Bolos. A month after the first
20 few with Scott Roix, and he told me, 'Boy, I hope you
21 don't get caught, you know. This is terrible
22 stuff.'" And I'm like, "What? Who's this person?"
23 It's just terribly unfair. So I think I'll have to
24 know that, and just because the government may have
25 given us the names of that person along with the name

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1 of 200 other people I don't think gets us there. We
2 need to know, especially if they're going to rely
3 upon co-conspirator hearsay.

4 Now I'm not saying that they need you to
5 tell us all the co-conspirator statements which they
6 intend to get in throughout this. That's more --
7 I've not seen that really granted, but by asking, at
8 least in many districts we've probably throwed the
9 Middle District horrors. I came from the Southern
10 District of Texas before there, and I have seen in
11 many districts that courts do exercise that
12 discretion and say, "Tell them who the unindicted
13 co-conspirators," and some prosecutors do it
14 voluntarily. And there's really no harm to the
15 government, especially, Sir, with your observation
16 that they say they've already given you those names
17 somewhere in this mass of discovery. "Well, just
18 tell us which ones of the unindicted
19 co-conspirators they wish no harm," and then we know,
20 and then we can prepare.

21 There is also this item, more than 100
22 doctors. So does the government intend to prove
23 allegations relating to 100 doctors? Again, if they
24 do, that's fine, and then we'll know what we have to
25 do, but if their proof is something less than 100

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1 doctors and it's there anyway, then they'll indict
2 or as to taking control, we can rely on this pharmacy
3 or this one or that one for this. I don't
4 necessarily, Sir, if I'd asked them for their theory
5 of the case, I'm not asking for a prosecution memo.
6 I'm just asking, "Just tell us what it is that you
7 intend to prove. Who generally are you saying are
8 the people who we should be concerned about so we can
9 prepare." And respectfully, Judge, I don't think
10 it's unreasonable.

11 If we look at Page 4, for example, of the
12 indictment, Paragraph 8, it's alleged as we come down
13 Larry Smith used Tanith and its employees to conceal
14 his ownership. Who's that? So is there going to be
15 testimony? Presumably, that person is a
16 co-conspirator. Presumably, somebody is going to
17 come in here and say, "Oh, yeah, I took all these
18 steps so I could conceal this place of identity."
19 Okay. Well, if that person is going to be an
20 unindicted co-conspirator, we should know who he is.
21 And it's not that much. It's not all that burdensome
22 to give that to us. They say so.

23 Paragraph 37, I'll read. It says,
24 "Beginning not later than June 1, 2015 and continuing
25 through the duration of the conspiracy, other persons

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1 and pharmacies known to the grand jury entered into
2 agreements with Roix." Okay. Who? Because they say
3 entered into the conspiracy. They came in through
4 presumably their legal agreements. So that if
5 they're co-conspirators, and if the jury were to find
6 they were conspirators, we're clearly responsible for
7 their acts. So we should have the opportunity to
8 know who they are so we can defend the case. So that
9 we can come before this Court and say, "Well, we'd
10 like to file a Motion in Limine because we think that
11 this person or this entity or this group should be
12 excluded for whatever reason under 401 and 403
13 hearsay rules, whatever."

14 Paragraph 48, the bottom two sentences, "As
15 a result, kickbacks from the Synergy principals,"
16 that's our guy in Larry Smith, Mr. Kehoe's guy, "and
17 others known to the grand jury."

18 THE COURT: What paragraph is that?

19 MR. FOSTER: Paragraph 48 on the bottom of
20 Page 20, Sir.

21 THE COURT: Twenty.

22 MR. FOSTER: The second sentence from the
23 bottom.

24 THE COURT: All right.

25 MR. FOSTER: Starting with "As a result."

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1 THE COURT: All right.

2 MR. FOSTER: "As a result, kickbacks from
3 the Synergy principals, Larry Smith and others known
4 to the grand jury, were the only source of revenue to
5 help right what is wrong." Okay. So there's a
6 kickback allegation in the indictment, and here
7 they're saying that there are other people known to
8 the grand jury during the course of the conspiracy
9 who are also making kickbacks, it is alleged, to
10 Scott Roix. Well, Scott Roix has been provided as a
11 witness. They certainly know who these people are,
12 and, Judge, if they're going to charge us with it,
13 they should tell us what it is so we can defend it.

14 Judge, one of the drives to discovery that
15 we received, it's got I think hundreds of thousands
16 of recordings of patient calls. Okay. That's
17 terrific. So do we have to listen to the thousands
18 of recordings if the government could say, "Okay,
19 Guys. You know, we intend to use maybe -- listen to
20 these 300 - right? - without the other 2,500." Okay.
21 Just some direction, just some direction. We are not
22 asking for their theory of the case.

23 There's something else that strikes me in
24 this case is that if this was a civil case, we could
25 proffer Interrogatories and say, "Who are these

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1 people?" Right. "What are these doctors?" And we'd
2 get it. It's like commonplace. Nobody needs to talk
3 so much, and you get it. And there were items about
4 money, and here we're fighting for freedom because
5 the numbers in this indictment are astronomical.
6 It's just astronomical, and when there's so little
7 burden to the government to provide us what we're
8 asking and it really will help us avoid surprise and
9 be able to effectively defend our clients in this
10 case, it's really in light of anything, Sir.
11 It's really something which merits the exercise of
12 your discretion to compel the government to provide
13 this.

14 There's something else, and I've read a lot
15 of the transcript, the transcript of the other
16 hearing before the Court, and something else that's
17 like a real issue in this case, and I guess it'll
18 come out in the severance motion. The way this
19 conspiracy is wrought, and I know in the pleadings
20 there's a reference to the Katiachis (phonetically)
21 case. This is a very, very troublesome conspiracy
22 allegation. So you have Mr. Smith's vertical, and
23 then you have the Synergy vertical. These people
24 don't know each other. These people don't know each
25 other. They don't do business with each other.

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1 They're competitors. So you have a hub, which is
2 Scott Roix, but what the case is, Katiachis, and I
3 found a, I found a district court case from the
4 Nashville Division, *United States versus Adan*,
5 A-d-a-n, and the cite is 913 Fed. Sub. 2nd, 955, 913
6 Fed. Sub. 2nd, 955, and that was a reversal of a
7 conspiracy prosecution because there, like here, you
8 have these two verticals where they don't have a
9 common goals. You don't have injured defendants, and
10 it's not a properly charged conspiracy. It is a
11 multiple conspiracy. It is a rimless conspiracy. So
12 if this case were to go forward to a jury where we
13 have this rimless conspiracy where all this business
14 is going to be charged -- or proven, rather, related
15 to Mr. Smith, and we don't know really who any of
16 these people are and all of this is going to be
17 proven concerning our people and they don't know
18 really who we are and the jury is going to be told,
19 "Well, you know, there are 194 -- it's almost a
20 billion dollars in false things here, Ladies and
21 Gentlemen, and these people are responsible, and if
22 they're looking for a few acts -- you know, he's
23 charged in conspiracy with Larry Smith," that would
24 be -- you know, it's like -- it seems to me like he's
25 involved. It's just, it's just so treacherous for us

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1 given the length of time, three years, the amount of
2 claims, the amount of entities, the amount of
3 patients, the amount of doctors. I do not want any
4 unindicted co-conspirators (inaudible). I know that
5 Mr. Roix, who pled guilty, his family worked for him
6 at HealthRight. So are they co-conspirators? It'd
7 be good to know. Right? Are they going to testify?
8 Okay. We're not (inaudible). Just let us know how
9 we can -- And the fact that we may get a witness down
10 the road, that's good. That's great, and that's
11 something that is greatly appreciated by the
12 government's offering to do that, but in this case
13 with the trial date still a year out, it would be
14 especially helpful to us to have access to that
15 information now so we could prepare a more meaningful
16 motion and more meaningful preparation and just make
17 everybody's job easier. Thank you, Judge. Unless
18 you have questions...

19 THE COURT: No. I think you've covered
20 that very well, and I've read the briefs in this
21 case, which were very well written, too. All right.
22 Who wants to argue next?

23 MR. SUAREZ: Thank you, Your Honor. Good
24 morning, Your Honor. Eddie Suarez on behalf of
25 Michael Palso. Your Honor, I intend to be very

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1 brief. I just want to supplement the presentation
2 Mr. Foster made on behalf of the Synergy principals,
3 Mr. Assad and Mr. Palso and Dr. Bolos.

4 Your Honor, to put some of Mr. Foster's
5 comments in a little bit of context, I want to draw
6 your attention to look at the Court's chronology and
7 the size of the discovery. We know -- and there's
8 been a little bit of back and forth. I think one of
9 the footnotes in their response in opposition to our
10 Motion for a Bill of Particulars, the government
11 acknowledged that they represented as seven terra
12 bytes of information initially, and they have now
13 determined that a significant portion of that is
14 roughly five or six terabytes that they have deemed
15 to not be relevant or they also claim that it has not
16 been reviewed by them. So that's probably something
17 for another day, but I think that we all agree that a
18 terabyte document that has now been produced, and I
19 think it's important to sort of conceptualize that or
20 to frame it in terms of things that at least those of
21 us lawyers of a certain vintage understand or can
22 grasp a little clearer. That is, what does that
23 mean in terms of paper because that's what at least
24 I'm used to dealing with.

25 And so I went to a number of discovery

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1 websites just to get some numbers, and some of those
2 we put in our motion. In terms of worded documents,
3 we're talking about 86 million pages of documents.
4 So when Mr. Foster talks about some of their
5 questions that we have that need answered in order to
6 properly prepare the defendants' case, it's not as
7 simple as saying read 86 million pages in the next
8 365 days, and you'll have your answer. That is just
9 an unsurmountable task. It's just not realistic and
10 cannot possibly lead to a just resolution, which is
11 why I think we need some assistance from the Court in
12 terms of directing the government to give us a
13 response in the way of a Bill of Particulars.

14 I want to -- they just had one example, a
15 factual example to what's in our motion and to Mr.
16 Foster's presentation, and that is the amount of
17 money the government is alleging. So in the
18 indictment in Pages 1 and 2 of Document 1, the
19 government alleges that there is \$174 million that
20 was obtained by the conspirators and in false claims
21 submitted to the tune of \$931 million, almost a
22 billion dollars. Then in their response to our
23 Motion for Bill of Particulars, Document 110 on Page
24 2, the government says that the Synergy defendant
25 received approximately \$77 million and that Mr. Smith

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1 and those entities received approximately \$24
2 million. Well, if you add those two numbers up, you
3 get somewhere in the \$111 million or \$112 million,
4 which leaves a significant gap from the \$174 million
5 that's alleged in the conspiracy. So just to keep
6 the numbers simple, there's about \$70 million that's
7 missing by the number alleged by the government in
8 the indictment, and we have no idea where that money
9 went. Who is it that received that money? And where
10 we stand right now, and presumably the government's
11 direction was, is look to the 86 million pages that
12 we provided you in order to find that answer, and
13 then I go back to our -- that is just an unreasonable
14 and it's an undoable task for us to do. So with
15 that, Your Honor, I'll sit down, and I thank you for
16 -- unless you have questions.

17 THE COURT: So your concern is with
18 respect to the amount? It's the identification of
19 this other seventy some million dollars obtained by
20 these other co-conspirators? So you would like me to
21 order them to give you that information to explain
22 where they come up with the 174 so that you can say,
23 "All right. Here's the 174. This is attributed
24 Synergy 77, Smith 24, X, you know, another 77."

25 MR. SUAREZ: That's right, Your Honor. It

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1 really coincides with Mr. Foster's request, and we
2 have no idea who these other co-conspirators are, and
3 so we have this universe presumably of
4 co-conspirators that presumably, I'm guessing, is
5 where this missing \$70 million is. I really don't
6 know, but that would seem a logical conclusion. So
7 we have this significant pool of money. We have no
8 idea who it went to, and we have no idea who those
9 people are and they're alleged to be co-conspirators
10 with, who presumably gained this significant amount
11 of money that we have no clue. So in essence, yes,
12 that is exactly what -- the identity of those
13 individuals and the money that they allegedly made is
14 among the things that we think would be appropriate
15 for us to understand.

16 THE COURT: Okay.

17 MR. SUAREZ: Thank you, Your Honor.

18 THE COURT: Thank you.

19 MR. KEHOE: Good morning. Greg Kehoe on
20 behalf of Mr. Smith and Tanith and ULD and also in
21 summary Alpha-Omega, Germane, and my co-counsel, Mr.
22 Dale Sisco, who is on the line and is invited to get
23 into anything with the Court's permission I think in
24 the argument...

25 THE COURT: Okay.

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1 MR. KEHOE: ...and I will potentially
2 address all of those, which is (inaudible)
3 at the outset. I know Your Honor from the arguments
4 on the transfer, know that he said that he didn't
5 (inaudible). I mean this is a unique case, and when
6 we look at a Bill of Particulars generally --know
7 Your Honor is well familiar with the case law, that
8 some Bill of Particulars are granted, motions are
9 granted in certain cases, and some are not.

10 (Inaudible) Bill of Particulars is not granted, and
11 the case law is replete in that regard. When it
12 became more sophisticated or more complex as Mr.
13 Harker has defined this case that had a nationwide
14 scope with thousands of people involved, the
15 complexity makes it much more difficult to defend,
16 extremely difficult to defend.

17 We have a scenario here where there are
18 conspirators known to the grand jury that none of the
19 defendants theoretically have ever met, don't know
20 anything about, are in Florida, are in Tennessee,
21 doctors. I think that there were 100 doctors listed
22 that were supposedly deceived. Where are they? Are
23 they here? Are they in California? Are they in
24 Florida? And how about the doctors who are
25 complicit? You know, there are two doctors, doctors

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1 that are described by the government, some who were
2 deceived and some who were complicit. Who are they?
3 Are they co-conspirators? Are they co-conspirators
4 known to the grand jury, and where are they? As far
5 as defending the case goes with the folks that are to
6 my right and behind me, we have an obligation
7 technically as Your Honor knows is to defend to the
8 best of our ability. And how are we supposed to
9 defend this vast array of potential co-conspirators
10 if we don't know who they are? As Your Honor knows,
11 under Rule 801(d)(2)(E) of the Federal Rules of
12 Evidence, we're entitled to, of course, impeach the
13 credibility of a declarant, albeit that declarant is
14 not important. How are we conceivably supposed to do
15 that? We have no range of knowledge of almost any
16 number of -- any number of co-conspirators that are
17 out there. It's just impossible to get your arms
18 around it.

19 And it's not helped by a variety of other
20 factors, Judge. I mean with regard to the conspiracy
21 itself, the dates, the location of the formation of
22 the conspiracy. The conduct in furtherance of the
23 conspiracy is very vague in addition to the various
24 unnamed actors and conduct that they have
25 participated in. When you overlay all of that

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1 complexity and unknown on the fact that not only do
2 we not know who these co-conspirators are, these
3 defendants didn't even know each other. We move into
4 an area of extreme difficulty, and the one thing that
5 Rule 7 is supposed to evade, which is surprise at
6 trial. I mean isn't that -- that's really why we're
7 here, Judge, because at the end of the day no one
8 wants to be surprised at trial as to what is going to
9 be brought before a jury of twelve. And the way we
10 have the landscape right now it's impossible to know.
11 You weigh that data upon facts, circumstances and
12 involvement on the issues concerning what's illegal
13 and not illegal. I am somewhat baffled by some of
14 the arguments that have been advanced by the
15 government using language like -- and I know this is
16 some degree in the surplusage of argument, using
17 language like advanced AWP, you know, average
18 wholesale price. What is that? They throw this
19 around like it's, you know, sewer gas. It makes a
20 lot of noise, and it looks terrible. I think what is
21 that? I mean I think one of the things even for the
22 Court, if you're going to use this in some area that
23 shows the complicity of all of these individuals
24 allegedly doing nefarious things, please give us an
25 idea of what average wholesale price, average whole

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1 price is, given the fact that these defendants had
2 nothing to do with setting the average whole price,
3 nothing whatsoever. And, of course, I can't keep
4 talking about this at some length during the transfer
5 hearing. This use of the Florida statutes, that
6 would be kind of just like jump some Florida statutes
7 into the indictment, and the argument that I think I
8 heard from Mr. Harker - I may be wrong. You guys can
9 correct me - was that, "No. We want to make sure
10 that there's an advice of counsel defense," all of a
11 sudden shot that little thing in there, but we really
12 don't expect a juror to have to understand Florida
13 statutes. So, you know, we haven't just put it in
14 there to prevent that defense. Some idea, Judge, of
15 what the government's position is of that given that
16 this is an indictment leaves most of us, you know, in
17 the dark without some further explanation. And we
18 can talk about that to some degree, and if I could
19 just touch on that as I go through this chapter and
20 verse, Judge, later on as well as the briefs in this
21 matter and discuss -- excuse me, and thought through
22 the competing arguments that have been laid out. I
23 think the first at the outset is the discovery here.
24 Obviously, we were given, additionally given seven
25 terabytes of information and now there's something in

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1 -- Mr. Harker said now there's something in error,
2 one terabyte, which don't ask him he bases that is,
3 but I can tell you one thing - it's a lot, and
4 through that we're supposed to decipher through
5 exactly what's pertinent and what's not. And he
6 likewise argues that this was, you know -- I believe
7 that he argued that it was discoverable. It was easy
8 to wind your way through and find out exactly what
9 was going on. With all due respect to my learned
10 friend, Mr. Harker, frankly nothing is further from
11 the truth. If you look at the first hard drive,
12 there are 634 files, 634 in just the first hard
13 drive. None of it's OCR, and you have to go
14 literally through each individual file to find out
15 what's in it. The data is not searchable. I don't
16 know how, and maybe the government's got a different
17 searchable system than the rest of us, but I don't
18 know how that we -- and we can argue that files like
19 this are searchable, but nothing is OCR. It makes it
20 extremely, extremely difficult. So you end up having
21 to go through this maze to try, Number 1, to get it
22 open and, Number 2, to figure out where it fits into
23 all of this.

24 THE COURT: So what I hear you saying is
25 that the discovery may have been given to you that

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1 may address a lot of these things, but the way in
2 which it is presented, it is, it is an enormous
3 burden to go through because of the number of files.
4 It's not searchable, and it's kind of like -- is it
5 not organized? Is it just a...

6 MR. KEHOE: There was no way. When you go
7 in to see the file, then you tell me, Ladies and
8 Gentlemen. Correct me if I'm wrong. The files are
9 not listed. They're not described. They're just
10 files. In the first, in the first typed part, it
11 says 635. There's no idea what it is. It's just
12 this array of stuff that's in there, and it's
13 equivalent to the old days, Judge, of when we harken
14 back to trying cases many years ago where, you know,
15 the government would tell the defense lawyer, "Here's
16 a warehouse full of stuff. Your stuff is in there,
17 and have at it," and kind of figure out what you
18 need. So that likewise meets the argument, "Well,
19 oh, in fact, we turned everything over," but, you
20 know, you spend the basic part of your adult life
21 over the course of several years to try to look at
22 it. Suffice it to say, Judge, the rules don't
23 contemplate that. Certainly, Rule 7 doesn't
24 contemplate that. It contemplates a rational
25 approach to discovery to allow the ladies and

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1 gentlemen to my right to do -- to perform their
2 ethical jobs, to meet their ethical standard and
3 defend their clients, and when they walk into a
4 courtroom, no one is surprised at trial about pieces
5 of evidence and the array of matters that the
6 government is disposed. The way it is right now
7 there is no way to get your arms around this without
8 literally spending hours and hours and hours between
9 now and next April to do just that, and I just -- I
10 submit to Your Honor that the rule doesn't
11 contemplate that. The purpose of Rule 7...

12 THE COURT: What do you want me to do -
13 just order them to identify the specific items of
14 evidence? Is that what you're asking me to do is...

15 MR. KEHOE: I think the government thinks,
16 Judge, consistent with what colleagues have said is
17 it's not like identification of, you know, what --
18 who are these co-conspirators that are known to the
19 grand jury? That will at least give us some idea of
20 who is pertinent in this array of documentation and
21 who is not.

22 The second thing is, is there's -- I
23 assume, I assume that the government has this
24 documentation and is going to employ that, use that
25 documentation during the course of their

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1 investigation or in trial; that they have some theory
2 as to where all this information has to go or what is
3 it. That's not asking them for a theory of the case,
4 but it's just asking, you know, identify what is on
5 all of these files? Why is this stuff pertinent as
6 opposed to just turning to it and say, "Here it is."

7 THE COURT: So you want them to go through
8 each of the files and say what's perking? Is that
9 what you want me to do?

10 MR. KEHOE: What I'd like, Judge, is to
11 maybe go through these files and when you open up the
12 634 files, what's in each one of those 634 files.
13 Are some of them irrelevant, of no consequence?
14 What's in the 634 files? That's the only...

15 THE COURT: And you can see what's in it.
16 Right? You can open up the files?

17 MR. KEHOE: You can open up a file, and you
18 -- you can open up the files, and there is -- you
19 open up a folder, and within that folder there are
20 files.

21 THE COURT: Right.

22 MR. KEHOE: I mean you can do that.

23 THE COURT: I mean I don't know. I don't
24 -- I haven't been given discovery, and I haven't
25 looked at discovery. I just want to -- I want to

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1 make sure I'm understanding the way in which the
2 government has provided you all with information.
3 That's my issue. And if I hear you say you can't
4 even see what's in the file or we don't even know
5 what's in the file or what's pertinent or we don't
6 know anything about it, that tells me something -
7 that maybe -- are you not -- is it not -- are they
8 not giving you the stuff that you can actually look
9 at, or is there...

10 MR. KEHOE: You can't search in it.

11 THE COURT: You can look at it, but you
12 can't, you can't search it, or is it not openable or
13 what?

14 MR. KEHOE: It's openable.

15 THE COURT: Okay.

16 MR. KEHOE: It's openable. I don't even --
17 let's look at where you start. You start with seven
18 terabytes. That was handed over to us. That's an
19 enormous amount of information.

20 THE COURT: Right.

21 MR. KEHOE: I assume that was given over to
22 us because the government wants some flexibility,
23 that within that seven terabytes of information they
24 can say should they decide to use it, "We gave it to
25 you." That's Number 1. That's a tremendous amount

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1 of information.

2 THE COURT: They've reduced it down to one.
3 Right?

4 MR. KEHOE: For all intents and purposes,
5 Judge.

6 THE COURT: Okay.

7 MR. KEHOE: If, in fact, we get to trial,
8 are we limited to that one terabyte of information?
9 Is that a stipulation, that we're not going to use
10 any documentation or information or anything other
11 than that? Because if that's the case, of course,
12 you know, we'll ignore the six terabytes that they're
13 not going to get involved in. But that -- if that's
14 not the case, then we're still being -- it's
15 incumbent upon us to find out what's in that.

16 The second thing is, Judge, I assume the
17 government has got some methodology to search these
18 files. In the first -- you know, in the first hard
19 drive we received, do they OCR this stuff? I mean
20 was it, in fact, searchable? If I put Larry Smith
21 down in there, I can't search these files. And this
22 is something that is almost the standard in a civil
23 case, not almost the standard. It is the standard.
24 I'm sure that every case that comes before Your
25 Honor, you know, it has to be in searchable function

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1 in the discovery that's given or no cases would move
2 promptly through. This is really -- we're not asking
3 for something that is extraordinary here. We're just
4 asking for some methodology to give us some notice so
5 we can, you know, properly and efficiently use our
6 time to address the discovery that's before us. And
7 then I've been saying, Judge, these issues are not
8 necessarily independent of one another. When you're
9 going through this, if you have an ID of who, in
10 fact, for instance, if you know who the conspirators,
11 co-conspirators known to the grand jury are, it makes
12 your searches, of course, significantly more narrowed
13 and more efficient, and you know what you're looking
14 at, but now, because we didn't even know that, we're
15 still in the dark as to what this -- who these names
16 are in some of these documents. It's a very
17 difficult proposition, Judge, and it is not something
18 I would say, Judge, that was handed to the Court and
19 asked for a Bill of Particulars every day. So this
20 is a different, complex case over a significant
21 period of time, over a significant geographical area
22 involving millions and millions and millions of pages
23 of records, and we're just asking for some type of
24 help from the Court so we can navigate through this
25 and get some clarity as to what the government's

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1 position is, not only on who is involved, but also,
2 you know, what documents are pertinent to this.

3 THE COURT: Well, that's my question, and
4 then you said you want to compel the government to
5 identify the co-conspirators, and as far as all the
6 documents are concerned, you'd like for them to give
7 you files that are searchable.

8 MR. KEHOE: Yes.

9 THE COURT: Right? And then identify
10 which specific files that they intend to use.

11 MR. KEHOE: Well, Judge, if, in fact -- if,
12 in fact, we're not involving ourselves in six
13 terabytes of information and we do not have to worry
14 about it, is that the clear position that the
15 government is taking in this matter; that the only
16 pertinent information is on one terabyte of
17 information, which -- I say one terabyte of
18 information link. It's not warehouses full of
19 information. It still is. It's not clear to me that
20 that's the case, but it has to come up with some type
21 of -- we have to come up with some type of remedy,
22 Judge, where when we're going into trial and the
23 government -- the defendants aren't shocked by, A,
24 some defendant that -- some co-conspirator that comes
25 in that they've never met, they don't know anything

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1 about, and we know that there's a distinct
2 possibility that given the fact that these defendants
3 didn't know each other and they're not going to be
4 taken by surprise and that these defendants are not,
5 you know, convicted on some co-conspirator statements
6 made by someone that the government alleges was in
7 furtherance of a conspiracy in another place and
8 another time that they don't know anything about.
9 It's just asking for additional information to
10 clarify where the government is coming from. And the
11 government's answer to all of this, Judge, is, "Oh,
12 it's all in the indictment." Well, you know, Judge
13 who's -- I have a simple question. Who's the victim
14 in this case? Is it TriCare? Is it the federal
15 programs? Is it the PBM's? It was a horrendous
16 warning that we were talking about individual
17 customers. Who is it? I mean what -- to go on, what
18 are inflated AWP's? In Paragraph 43 they make
19 allegation that employees were instructed to engage
20 in test billing. Who? Which defendant? Mr. Smith?
21 Mr. Bolos? Who? I mean who created this list of
22 inflated AWP medications, and as I said before, who
23 are the doctors that were receiving it? Who are the
24 doctors that were complicit? The government's answer
25 to all of this is, "Read the Complaint." That's not

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1 helping, Judge. That's not helping.

2 My question, Judge, at the risk of
3 repeating myself, we've also asked for some clarity
4 to understand exactly what the government thinks is
5 relief, not the least of which is the recitation of
6 the Florida statutes. Putting aside the fact that
7 this is clearly two conspiracies, two -- looking in
8 the light most favorable to the government, this is
9 two conspiracies and not one. These defendants
10 didn't know each other. If you look at Paragraph,
11 you know, 32 of the indictment, it says that all of
12 these defendants knew -- agreed to operate together.
13 Well, they didn't even know each other. God knows
14 what the evidence is concerning people who -- we
15 don't even have their name on the radar screen here.
16 There's got to be some additional clarification as
17 to, putting aside some clarity of what the government
18 is saying is illegal, some idea of equal events,
19 locations and what the government is going to, going
20 to advance during the course of this case so a
21 defense can be prepared. It is what Rule 7 requires.
22 It does not permit the government to just venture
23 into a variety of different areas and pick and choose
24 what they want and then decide when it comes trial
25 time, "This is what we're going to advance in front

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1 of the jury," not even talking about when we get -- I
2 mean this whole thing about money laundering, this
3 whole theory that the money laundering is an
4 intricate part of this conspiracy, albeit the
5 government never tried -- never charges a 1956 or a
6 1957 charge under Title 18, probably because they
7 didn't get off probation for the money laundering
8 section in Washington, but be that as it may, they
9 throw around that argument, this idea of money
10 laundering, and it's clearly a prejudicial argument.
11 You know, but we're having to talk about that in the
12 Motion to...

13 THE COURT: Well, that's not in the Bill
14 of Particulars?

15 MR. KEHOE: That's not in the Bill of
16 Particulars.

17 THE COURT: Okay.

18 MR. KEHOE: But it does goes to the theory
19 that the government is advancing here as to what is
20 legal or illegal.

21 THE COURT: Okay.

22 MR. KEHOE: Who is supposed to be the
23 victim here, Judge, and what are these other statutes
24 and other comments that they advance, how are they
25 somehow part of this criminal theory, and do I take

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1 them off the top of my head? Are they inflated
2 AWP's, which don't exist, and also they use the
3 Florida statute. And what we're looking to, Judge,
4 is some indication or some additional clarity on some
5 of these positions just to help us prepare and not
6 be, you know, surprised at trial. And I think that
7 at a minimum, Rule 7 contemplates that. I don't know
8 if my colleague, Mr. Sisco, Dale Sisco, the good
9 looking Sisco, who is on the phone, has anything
10 further to add. If I could just turn to him for a
11 moment and ask him if he does.

12 MR. DALE SISCO: No, thank you, Judge. I
13 think it's been well covered by Mr. Kehoe.

14 THE COURT: Okay. All right. Very good.

15 MR. SUAREZ: Your Honor, would the Court
16 permit me to add a little bit on some of the
17 questions that you asked Mr. Kehoe, particularly with
18 the condition of the discovery that was provided?

19 THE COURT: Yeah. You can address that.

20 MR. SUAREZ: Thank you, Your Honor. It's
21 Eddie Suarez. I'm here on behalf of Mr. Palso. Your
22 Honor, I spent a significant amount on time to the
23 discovery part I understand was there, and I think I
24 can explain to the Court in a manner that'll make
25 some sense. So, for example, if you were going to

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1 read the reports introduced, which what we generally
2 refer to as 302's, there is a -- there's one hard
3 drive. There is largely a folder in which those
4 reports of the interview are contained, and they are
5 -- once you open that, what you will find is a series
6 of folders that are divided by agency. So for
7 example, the reports that were generated by the FBI
8 will be in one folder. The reports that were
9 generated by the FDA will be in one folder and so on.
10 There's a series of folders divided by agencies, and
11 when you open that folder, you get a plethora of
12 individual files that would be the interview done
13 with Mr. Percell and the interview done with Mr.
14 Sisco and the interview done with these countless
15 witnesses in the case. There is no way if you
16 wanted, for example, to read the reports of interview
17 of Scott Roix, the head of HealthRight, who is a
18 cooperating defendant -- you would not be able to go
19 into these four hard drives and enter the name Roix
20 and somehow be able to figure out where he is in this
21 over one terabyte of materials. There's no mechanism
22 for doing that, and so you would have to open up
23 every folder, then look at the list of the file names
24 in the reports of interview, hope that the creator of
25 that file include Mr. Roix's name in the file and

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1 say, "Okay. There's a report from Mr. Roix," open
2 that and read it and likewise go through that
3 process. So I hope that helps a little bit for the
4 Court to visualize how the discovery is organized.
5 There is no master index, and by index, I don't mean
6 the stuff you find in the back of a book. As you
7 know, computer programs go in, and they sort of
8 search data, and they create a computer index, which
9 then in a particular application can go find
10 documents. That doesn't exist in the way those have
11 been turned over to the defendants. They're all
12 individual files, and then, you know, Mr. Foster had
13 suggested many of these files have not been OCR'd.
14 So they're not searchable. Once you open a file, you
15 can't even search within that file. So I hope that
16 helps the Court understand a little bit.

17 You also asked questions about specifically
18 what relief we are requesting, and, Your Honor, in
19 Exhibit A of our motion, we sort of gave you like a
20 giant menu. Our thought would be that after you
21 heard the arguments, if some of our requests seem
22 reasonable to the Court, then you could select from
23 our giant menu those that you felt were appropriate.

24 THE COURT: Okay.

25 MR. SUAREZ: Thank you, Your Honor.

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1 THE COURT: Thank you. All right.
2 Anybody else want to be heard at this time for the
3 defendants?
4 ALL: No, thank you, Your Honor.
5 THE COURT: All right. Mr. Harker, do you
6 want to be heard?
7 MR. HARKER: May it please the Court, I
8 will respond to the Motion for a Bill of Particulars,
9 and Mr. Roach will respond to the Motion to Strike
10 Surplusage. Your Honor, if I could have the overhead
11 projector, please.
12 THE COURT: You can have what?
13 MR. HARKER: The overhead projector,
14 please.
15 THE COURT: I think it's on.
16 MS. OTTINGER: It's not on?
17 THE COURT: Does it not work? I see it's
18 is on. Can the defendants -- each of you all see th
19 this?
20 ALL: Yes, Sir.
21 MR. ____: Do you have a hard copy for us?
22 MR. HARKER: Okay. Now this a copy. Now
23 this is a (inaudible) document. When we first
24 addressed the issue of the organization of
25 discovery...

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1 THE COURT: Let me ask you. Your
2 contention is that the Bill of Particulars is not
3 necessary based on your supplying all the discovery
4 information that we're going to talk about right
5 here? This -- as a general rule, you're saying from
6 when I let in your response is that, "We have
7 answered every one of their questions given the
8 documents and the information we have provided in the
9 terabyte of information"?

10 MR. HARKER: Your Honor, the bona fide
11 questions, that is correct, our interest in that.

12 THE COURT: Okay.

13 MR. HARKER: There are other questions that
14 are answered in the discovery in a way that is easily
15 searchable. You can find that right in front of our
16 papers. I'm happy to discuss that right now.

17 THE COURT: Uh-huh.

18 MR. HARKER: So you have the ability that
19 is not necessary. It's not an appropriate use of
20 ability just to try to extract the government's...
21 And an important point that both Mr. Foster and Mr.
22 Kehoe mentioned was the need to identify particular
23 documents that the government is going to use. The
24 Court has already addressed this. The government has
25 agreed -- this is the Scheduling Order. Beginning on

1 July 10th, 2009 the government will begin enrolling
2 identification and production of (inaudible) trial,
3 and the deadline for that production is February,
4 more than two months before trial. In other words,
5 they will have every exhibit that we intend to
6 provide and use in our case in chief at trial at
7 least sixty plus days prior to trial and in some
8 cases a hundred plus days in advance of trial, 180
9 days in advance. So if they're concerned about
10 volume of evidence, which they shouldn't be for
11 reasons I'll get into, the Court has already
12 addressed that issue.

13 One of the things that counsel for the
14 defense raised in their argument was the amount of
15 money at issue in this vast array of unindicted
16 co-conspirators, how can the defendants know who the
17 other unindicted co-conspirators are. They're
18 worried they're going to be held accountable for the
19 conduct of other co-conspirators, who they don't
20 know. Now, Mr. Roix, he's a co-conspirator. They
21 know his identity and the company HealthRight. I
22 point out in the indictment that \$114, \$113 million
23 are directly attributable to the conduct of these
24 defendants, not unindicted defendants. That's \$114
25 million of approximately \$174 million. \$174 million

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1 is the allegation set forth in Paragraph 1, and the
2 remaining \$114 million is broken into three parts,
3 about \$78 million attributable to Synergy as set
4 forth I believe in Paragraph 85 of the indictment. I
5 may be off by a paragraph on that. Another \$11
6 million attributable to a sitting group of
7 pharmacies, in other words, Synergy, in that same
8 paragraph, and another approximately \$25 million
9 attributable to Alpha-Omega set forth in Paragraph 80
10 of the indictment. It's not these defendants that
11 should be worried about other co-conspirators. It's
12 those other unindicted co-conspirators they should be
13 worried about, Your Honor. They have the 60 or 65 or
14 whatever percentage that is of the conduct in the
15 conspiracy that is charged in this indictment. But
16 they also know exactly how these numbers are
17 tabulated because if you go into this folder right
18 here, Reports-FBI, there's a sub-folder that says
19 something to the effect of Reports of Forensic
20 Accountants-FBI Forensic Accounting VM, and in there
21 it's all the information. It tells exactly how these
22 numbers are calculated. It's searchable. Those are
23 direct, printed pdf. files in there and in
24 self-terms. If you go to the highest level directory
25 on this folder -- this is a printout, Your Honor,

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1 I'll represent to the Court, of the government's
2 version of this evidence, which is almost identical
3 to the version they have. For some reason, we had to
4 break some of the audio recordings into a separate
5 file to copy them, in fact, but this is almost
6 identical to what they have. For all material
7 purposes, it is identical, and I'll represent that to
8 the Court.

9 THE COURT: So it is searchable?

10 MR. HARKER: Yes. Yes, Your Honor.

11 THE COURT: They're saying it's not
12 searchable.

13 MR. HARKER: So, Your Honor, let...

14 THE COURT: Am I misunderstanding?

15 MR. HARKER: I think the misunderstanding
16 arises from a couple different sources. This is from
17 the government's brief, and it's not in color here.

18 THE COURT: Right.

19 MR. HARKER: This is 1.4 terabytes of data,
20 and that's a fair amount of date. It's in the top
21 here consists of 31 gigabytes of the main case file.
22 This 31 gigabytes is more or less these six pages
23 right here...

24 THE COURT: Okay.

25 MR. HARKER: ...in the response -- it's put

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1 on this in response every single entity of the
2 government's unit, who it pertains to, all
3 pharmacies, Synergy, Bolos, Boyd, Synergy,
4 HealthRight, Precision Pharmacy Management. Those
5 are all in that, page after page of well-organized
6 discovery. That's the 31 gigabytes. That's the
7 essential part of the case file.

8 Now, Your Honor, there's this large section
9 over here, probably three-quarters, 75 percent
10 approximately of the discovery, which consists of the
11 HealthRight material. In terms of bytes, the bulk of
12 that are audio recordings and electronic
13 prescriptions, hundreds of thousands of these audio
14 recordings. The defendants claim that they can't
15 search that material, and they wrote in their brief
16 that the manner of explaining and searching that
17 material is some indecipherable key known only to the
18 government. I'll represent to the Court that on a
19 call with all the defense lawyers in December I
20 explained the technique. I'm going to do again right
21 now. This is Exhibit Number 1. The defendants have
22 a copy. I printed this out this morning. The
23 defendants have an Excel chart of both pharmacies,
24 Synergy and Alpha-Omega. It's got tens of thousands
25 of rows. Let's say you wanted to find the audio

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1 recordings for this patient picked at random. I will
2 say the patient's name. It was transcribed.
3 Everybody can see the patient's name.

4 THE COURT: Okay.

5 MR. HARKER: You could also pick the
6 patients who are identified in Counts 2 through 32 of
7 the indictment. You pick that. They know who they
8 are, but if they want to know the -- if you need
9 magic in the decipherable key, it's the patient's
10 phone number right here. You then go to the folder
11 that has the audio recording. This is the bulk of
12 the evidence, hundreds and hundreds of gigabytes of
13 audio recordings. There they are. They've got this
14 indecipherable number, and I apologize. I should
15 have expanded the column here so you could see the
16 full file on that. If they go to "Search File" in
17 the top right and you put that phone number of that
18 patient right in there, and wallah! That's the type
19 thing that the government has to search these files.
20 There is no special other computer system that we
21 have. All of the evidence, all of it that the
22 government has obtained it has delivered to the
23 defendants in either the same form that they got it
24 or a much well or better organized one, all of it,
25 except for one exception. All the evidence that came

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1 from Synergy, all of that is much less searchable by
2 us, and that's about 25 percent of it. Those are
3 their emails, their pharmacy software. There are
4 response records. Our ability to search those items
5 is substantially less than their ability to do so.
6 So, Your Honor, the discovery is extraordinarily well
7 organized. Any item or method that they watched
8 they can find at an easily or more easily than the
9 government can. The idea that there are 86 million
10 documents here is simply a farce. That's not what
11 we're talking about. The documents are contained in
12 this 31 gigabytes of files. Everything else, the
13 audio recordings except the defendant's, Synergy,
14 files or HealthRight emails. Those HealthRight
15 emails are provided in Outlook psd. format, which is
16 searchable. You simply open it up using your
17 technology vendor or your own Alpha machine, and you
18 search the same way anybody would search Microsoft
19 Outlook. And that's what the government does.
20 That's what they can do here.

21 Now let's go back if I could retroactively,
22 Your Honor, and mark those Exhibits. This could be
23 Number 1, and then those three printouts of the
24 screen shot, I'll just call that -- this will be
25 Number 2. I apologize for this, Your Honor. I put

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1 this together this morning. This one will be Number
2 3, and this one will be Number 4, and I'm missing an
3 exhibit sticker for Number 1. So I'll just write
4 Number 1 here on the file, and the defendants all
5 have copies of these.

6 THE COURT: Okay. All right. Let it be
7 -- do you want to admit those?

8 MR. HARKER: Yes, Your Honor.

9 THE COURT: All right. Let that be
10 admitted.

11
12 (WHEREUPON, Exhibit No. 1, Excel Record and
13 Key, Evidence Folder Contents, IS FILED.)

14
15 (WHEREUPON, Exhibit No. 2, Three printouts
16 of screen shots, phone numbers, IS FILED.)

17
18 (WHEREUPON, Exhibit No. 3, Subpoena,
19 Synergy Recordings, batch 8, IS FILED.)

20
21 (WHEREUPON, Exhibit No. 4, Synergy
22 Recordings, Batch 8 (3166485998), IS FILED.)

23
24 MR. HARKER: Your Honor, during that phone
25 call in December when I represented to the defendants

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1 and I explained this process, I said, "If you don't
2 understand this now, feel free to call me." That was
3 December. I haven't received a phone call.

4 It seems to me that they're primarily
5 concerned about two things - knowing what our trial
6 exhibits are going to be and knowing who the
7 co-conspirators are. They know or will know what our
8 trial exhibits are going to be. They'll know what
9 those are beginning in July and ending not later than
10 approximately February 3rd according to the Court's
11 Order. The Court's Order, Your Honor, which the
12 defense and the government negotiated, we negotiated
13 those deadlines. By implication then those deadlines
14 were acceptable to them for the purposes of preparing
15 for this trial.

16 Also they've asked to receive
17 co-conspirator statements. Again, the Order on this
18 case provides Notice Required. The government
19 intends to introduce co-conspirator statements under
20 FRE 801(b) (2) (E). We have to send those seven days
21 in advance of trial. And that's it.

22 THE COURT: What do you make of their
23 argument? It looks like every one of them -- every
24 one of the lawyers claim that they just don't know
25 who these co-conspirators are, and, you know, they

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1 are completely in the dark regarding that. What's
2 your response to that specific problem they are
3 saying?

4 MR. HARKER: Your Honor, the indictment --
5 as I said earlier, the indictment alleges that
6 approximately \$174 million was obtained and that
7 these defendants specifically obtained -- actually
8 obtained about whatever \$114 million is divided by
9 \$174 million.

10 THE COURT: Right.

11 MR. HARKER: Maybe 60 or 65 percent.

12 THE COURT: Right.

13 MR. HARKER: Those other co-defendants,
14 clearly the primary person is Scott Roix.

15 THE COURT: Right.

16 MR. HARKER: Now I'll represent to the
17 Court that one of the things that the government
18 intends to show is that mechanisms that were employed
19 by one of these groups of defendants...

20 THE COURT: Uh-huh.

21 MR. RIGHT: Right. In furtherance of the
22 fraud, were then adopted by their co-conspirator,
23 Scott Roix, and pushed out to the other co-defendant,
24 not the unindicted co-conspirators. They may also
25 had been a part of it but these co-conspirators

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1 here...

2 THE COURT: Okay.

3 MR. HARKER: ...in this courtroom.

4 THE COURT: Okay.

5 MR. HARKER: So the idea that -- it helps
6 support -- I think it's fair -- I don't think they
7 could use the term hub and spoke because in my
8 experience, as a lawyer, sometimes that term is
9 misunderstood and used by people to do different
10 things. But I think it's fair to say that this is a
11 hub and spoke conspiracy. Now Scott Roix and
12 HealthRight were the hub. They were the entity that
13 the government alleged very clearly in the indictment
14 obtained these prescriptions at the direction of
15 various spokes. These are the two primary spokes.

16 THE COURT: Uh-huh.

17 MR. HARKER: The other unindicted
18 co-conspirators, they're spokes, not hundreds of
19 them, and all the information that they need to know
20 to identify these few people and few companies, they
21 have that information. Now this shouldn't hang up
22 the Court. If all the defendants were asking for was
23 a list of the unindicted co-conspirators the
24 government knows of today, we can provide that list.
25 I'll provide it to them. It's a couple lines long.

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1 THE COURT: Uh-huh.

2 MR. HARKER: But that's not list of --
3 that Motion for a Bill of Particulars as one of the
4 defense counsel argued today is, in effect, is having
5 to get us to identify and to narrow our ability to
6 prove all of the vast array of this conspiracy. So,
7 for example, they asked which of the employees did
8 Larry Smith direct to engage in certain conduct.
9 Well, I would represent they simply have to go to
10 these folders here that say Reports, and there are a
11 couple of hundred reports in aggregate across all
12 these things. Those reports are labeled FBI Report
13 Interview Of such and such case, more or less.
14 They're labeled more or less in a very usable format,
15 but those interview reports are also largely
16 searchable. It is the case -- I forgot to answer
17 Your Honor's earlier questions, "Is everything
18 searchable?" Not everything is searchable. Some of
19 the items in this document are paper records that
20 were provided to the government and were scanned by
21 us.

22 THE COURT: Right. That's not going to be
23 searchable?

24 MR. HARKER: That's not -- well, they can
25 OCR it, but what we're talking about there are the

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1 hundreds and hundreds of bank records. I think that
2 Your Honor can look at this chart, and you can
3 clearly see that there's just a huge amount of
4 financial records and claims data and so forth,
5 banks, banks, banks, banks, banks. The significance
6 of that is it just shows the money, but I doubt very
7 much at trial that these defendants as are alleged in
8 the indictment are going to contest that they paid
9 Scott Roix \$31 million. They're going to argue what
10 it was for, but \$31 million, that's a lot of money
11 for records to substantiate the \$31 million was
12 transferred from various accounts in the possession
13 and control of these defendants to account for
14 possession and control of the co-defendant who has
15 already pleaded guilty. So for the purposes of
16 talking about reports, if they want to know who
17 important patients are, they're in here. If they
18 want to know who the important doctors are, they're
19 in here. They also mention that there's over 100
20 doctors that are alleged to have been brought in as
21 part of the scheme, and they have a list of those
22 doctors. It's two pages. They've got that
23 information. They can look in the subpoena response
24 from HealthRight where the government said -- they
25 can see the subpoena. "Give us a list of all the

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1 doctors that you dealt with," and we provided it to
2 the defendants. That's searchable, too, by the way,
3 Your Honor. It's in an Excel form. They have all
4 this information. A little bit of diligence would
5 show them exactly where it is in each paragraph of
6 the indictment that the government has supporting
7 evidence in these folders. On top of that, we
8 offered to provide them assistance in searching for,
9 for example, audio recordings or the prescription
10 files if they can't do it. We haven't received that
11 phone call, and they can do it.

12 Now I'm not going to repeat anything that
13 I've wrote in my brief. Does the Court have any
14 questions for me, Your Honor?

15 THE COURT: No. I think that's -- I
16 appreciate your clarification of that.

17 MR. HARKER: Thank you, Your Honor.

18 MR. KEHOE: May I respond briefly, Judge?

19 THE COURT: If you want to, you certainly
20 can.

21 MR. KEHOE: Certainly, there was no
22 clarification regarding the roving allegations of the
23 indictment, be it off an APR or any of those comments
24 that I addressed in my opening. If Mr. Harker's idea
25 is that simply because, you know, \$17 million was

1 defrauded out of this \$114 that didn't involve the
2 defendants, that means that we don't find out who the
3 rest of these co-conspirators are, I suggest to Your
4 Honor that he is going to present co-conspirator
5 testimony involved in these other 17. If you want
6 the breakdown, Judge, the 114, the 78, and the 25
7 and there was this miscellaneous other group, which
8 was unidentified people of 17. Advancing the
9 argument for some degree that because that number is
10 small, the identification of the co-conspirators that
11 he knows and that the grand jury knows is somehow not
12 that important. Well, before a jury of twelve, all
13 the co-conspirators, all the people that are going to
14 testify as Your Honor well knows are equally
15 important. It's not a gauge of the amount that's
16 involved. It's the person that's testifying in the
17 box. So this separating of the numbers calculation
18 is a specious argument. And, Your Honor, we can go
19 back to the fundamental premise here of not being
20 surprised at trial. Why is the government so
21 reluctant to provide notice now so that we can do our
22 job and go through this file? You heard what Mr.
23 Harker said. This stuff is not the OCR. It's not
24 searchable. We cannot go in there and put Larry
25 Smith in there and pull his name out of this array of

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1 documents that he's talking about. I assume the
2 government has done that. I assume that they have a
3 search mechanism for that. What is the big, heavy
4 burden to them to simply give it to us? That's what
5 anybody would do in their own civil case. This is
6 not tough stuff. This is not going into what their
7 theory is. This is just giving an idea of where
8 things are, and the argument about HealthRight
9 answered a subpoena as to what documents that they've
10 dealt with, what doctors they've used during the
11 course of that, is that somehow some tacit mission,
12 that those are all the crooked doctors? That's the
13 first time I've heard that.

14 MR. HARKER: Your Honor, the government
15 hasn't alleged that any doctors are crooked.

16 MR. KEHOE: Well, I didn't -- whoever they
17 were. The government has, in fact, alleged in their
18 indictment that some doctors were complicit. They
19 did put that in their indictment.

20 Now there's doctor that were complicit.
21 There are doctors who were apparently -- you know,
22 according to the indictment that were duped. This
23 list that's in HealthRight, who are they? Are they
24 the duped ones, or are they the ones that were
25 complicit? Oh, we're supposed to just figure it out.

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1 I guess that's what Mr. Harker wants to do, just
2 figure it out. There are the names. You can go out
3 and do what you want. But it goes back to -- that's
4 just one subset of this array of co-conspirators that
5 are known to the grand jury and are known to the
6 government. The documents in -- a case like this
7 with this kind of complexity over this kind of
8 geographical area, over this kind of time, it is
9 simply consistent with Rule 7 in the case law to a
10 minimum provide us the names of who those people are
11 so we know when we're going through this, who they
12 are in the scheme of things. We're not asking them
13 for their theories. We're not asking them for a
14 heavy lift. We're simply asking them for that which
15 they've done already so when we go to trial, we know
16 what's going on. And for why -- you know, so some
17 form will be in the co-conspirator statements seven
18 days before is really -- depending on how many
19 witnesses that they intend to present and based on
20 some of the estimates that were advanced by Mr.
21 Harker early on, this case is going to be quite
22 significant. Getting co-conspirator statements seven
23 days before a complex case that is scheduled to go on
24 months will be in my humble opinion, using a legal
25 term, a completely spiritual experience of little or

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1 no consequence. So allowing us at this point to put
2 our arms around this raging, roving indictment that
3 the government has, with all due respect, Judge, it's
4 consistent with Rule 7, and we're just asking for
5 some minimal materials to advance that using Your
6 Honor's discretion as to what Your Honor believes is
7 fair under the circumstances given this array of
8 information that has been presented to us. Thank
9 you.

10 MR. FOSTER: Judge, may I have a couple
11 minutes?

12 THE COURT: Yes, you can if you choose to
13 respond.

14 MR. FOSTER: Thank you. Judge, I
15 understood the government to say that \$114 million of
16 the total \$174 million is attributed to these
17 defendants. So to me, that means that there's \$60
18 million that's attributed to other co-conspirators,
19 and I think we're entitled to know the details of
20 that and not just be directed to reports or to
21 folders and say "Find it yourself." But we are
22 entitled to know who that they think, who it's their
23 position were co-conspirators.

24 Now dovetailing to that, Paragraph K of the
25 Pretrial Order talks about Brady disclosures. Within

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1 14 days of arraignment - that's gone. That's behind
2 us - a separate Brady is covered by Janx (sp). They
3 are required to give us Brady disclosure. So does
4 this mean to say of the \$60 million in claims that
5 people were indicted, was there anyone who said,
6 "Well, you know, Roix told me this, this and this,
7 and I believe him." So they chose not to indict
8 certain people. This Brady time has passed. So if
9 there are any statements by anybody who's been
10 interviewed by the government except as covered by
11 Janx -- we know how narrow Janx is because it has to
12 be authored or this way the government doesn't turn
13 over 302. So if there was nobody who was interviewed
14 or nobody who the government is aware of that says,
15 "We all thought we were doing the right thing," among
16 these folks who were responsible for this \$174
17 million in claims, is there not a single person who's
18 going to say that? Because the government, Mr.
19 Harker said, "Well, you know, we don't think they're
20 going to argue that this is kind of funny," that's in
21 the bank records. He said, "We think they're going
22 to argue, 'What were we told as good faith?'" Right.
23 Good faith. Good faith -- five seconds, Your Honor.
24 So do they not have within any of the people
25 associated with that \$174 million, anybody who said

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1 that they were lied to, they were deceived, that they
2 were operating in good faith as to their dealings
3 with Mr. Roix? I suspect -- I would think logically
4 they do. So I'd like to point that out.

5 The last thing, Mr. Harker said or
6 volunteered to offer the list of the co-conspirators,
7 alleged co-conspirators, which, again, I would ask
8 the Court to accept that offer of Mr. Harker and also
9 the entities, because, again, in the indictment --
10 the indictment says entities and individuals,
11 unindicted entities and individuals who were
12 (inaudible) and in the conspiracy. So that's a
13 simple fix for him, and that would be helpful to us,
14 and I would request that that be provided. Okay.
15 Thank you.

16 MR. HARKER: All right. Your Honor, may I
17 just respond in twenty seconds?

18 THE COURT: Do you want to respond for the
19 individuals? Is that something you're going to do,
20 or I'm not -- I'm just inquiring.

21 MR. HARKER: Yes, Your Honor. We can
22 provide a list of the actual individuals who are
23 responsible for the balance of the \$174 million.

24 THE COURT: Okay. All right. In addition
25 to that?

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1 MR. HARKER: Yes. In addition, Your Honor,
2 the government is aware of it's Brady obligation.
3 We take that responsibility extremely seriously. We
4 are not aware of any Brady material in this case.

5 THE COURT: Okay. All right.

6 MR. HARKER: If we become aware of Brady
7 material, we will promptly turn it over.

8 THE COURT: All right. Yes, Sir.

9 MR. SUAREZ: May I respond to Mr. Harker's
10 comments?

11 THE COURT: All right.

12 MR. SUAREZ: Thank you, Your Honor.

13 THE COURT: And then we'll take a break
14 and then we'll get back...

15 MR. SUAREZ: I'll be very brief, Your
16 Honor. For the record, Eddie Suarez on behalf of Mr.
17 Palso. Your Honor, I want to address the issue of
18 the patients. I would point out that that was the
19 first item that was suggested in Exhibit A to our
20 motion was the identity of the patients who were
21 allegedly deceived. As has been pointed out in the
22 indictment on Page 2, the government or the grand
23 jury alleged that the conspiracy deceived tens of
24 thousands of patients. So to identify who these
25 deceived patients are is very important in order to

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1 defend this case. If we look at the indictment, a
2 number of individual patients are identified in
3 individual counts. Just using rough numbers, Your
4 Honor, it looks somewhere approximately -- there are
5 29 counts of individual patients. Those patients are
6 identified in the indictment by initials. So if I
7 understand the government's position correctly, and
8 perhaps I don't, but if I understand it correctly, in
9 order for me to review the recordings of those
10 patients, I would have to go to this master list.
11 Let's just take the first four in the indictment at
12 Page 37 or the first five, who are identified with
13 the initials J. L. So we'd have to look at this
14 master list that presumably has tens of thousands of
15 phone calls. I'd look for those that match the
16 initials J. L. and identify the phone number for them
17 and then be able to go through the recordings just to
18 see if I've got the right J. L. So I point that out
19 to illustrate just how difficult, if not impossible,
20 it would be to defend against the allegations of
21 patients who were deceived if we don't know who those
22 patients are.

23 Your Honor, Ms. Zysk has a couple of points
24 she wanted to make to the Court in response to Mr.
25 Harker. If she could do so on behalf of Mr. Palso,

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1 we'd appreciate that.

2 THE COURT: Do you want to talk, too?

3 MS. ZYSK: Yes, Your Honor.

4 THE COURT: Come and join the party.

5 MR. SUAREZ: Thank you, Your Honor.

6 MS. ZYSK: Thank you, Your Honor. Rachel
7 Zysk for Mr. Palso. The one thing I wanted to make
8 clear is this is not a discovery motion. This is
9 like charge conduct. So while the government's offer
10 of providing us with a two-line list of who they
11 alleged to be 45 percent of this conspiracy doesn't
12 really get to the heart of the issue, and that is
13 what has the government charged? What do we have to
14 provide at trial? The discovery only matters for
15 purposes of us understanding what the charges are to
16 choose limited discovery in federal criminal cases.
17 It's not about the discovery itself, and the
18 searchability and the ability to review the discovery
19 really goes to what is the government alleging
20 occurred and because of -- is the Bill of Particulars
21 limited to the government's proof? Because that's
22 much more important than a two-line list, "Here are a
23 couple of our co-conspirators." We need to know
24 exactly what we (inaudible) at trial. We need to
25 know what, once we are able to search the discovery,

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1 what we search for, what these co-conspirators are
2 alleged to have done, what we are alleged to have
3 done, what the government alleges is illegal? If
4 Scott Roix is the hub of this conspiracy and some
5 person off in Texas that we've never met is another
6 hub, how are we supposed to search discovery for his
7 name? So a written Bill of Particulars limits the
8 government's allegations to what has occurred, and
9 that's what we really need to prepare for trial.

10 THE COURT: Okay.

11 MS. ZYSK: Thank you.

12 THE COURT: Okay. Well, let's take a --
13 do you want to say something?

14 MR. FOSTER: I just want to ask one point
15 of clarification that's been our concern. I
16 understood that Mr. Harker volunteered to provide a
17 list of the individuals and the entities that
18 comprise that remaining dollar amount of the claims,
19 but we had asked for -- and I thought that initially
20 he had volunteered to give the names of the
21 unindicted co-conspirators. So the entities that are
22 responsible for that other \$40 million and those
23 people who are responsible for that additional money
24 is not the whole set of unindicted co-conspirators.

25 THE COURT: Okay. That's fine, and I'm

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1 just going to rule and let you know the argument --
2 I'm not going to tell him (inaudible) voluntarily,
3 just get something to moot the issue, but if it's not
4 enough, then I'm just going to address the motion
5 that you all have asked in the Order.

6 MR. FOSTER: I didn't mean to be...

7 THE COURT: Well, he's not -- what he's
8 giving you is not going to the issue because there's
9 more you wanted to be turned over. Right?

10 MR. FOSTER: I thought there were two
11 offers. I thought at the beginning he said that he
12 could provide us a list - it would be a short list -
13 of the unindicted co-conspirator.

14 THE COURT: Okay. I tell you what. Why
15 don't you all talk about this? Why don't you all see
16 if you can -- why don't you talk about whether or not
17 you can do the -- if you can't, that's fine, but I
18 don't want to get into the, "He's not giving me
19 enough, or he's not given me, you know, what I asked
20 him for. We asked for this." Because it makes more
21 since to do what you're -- you're willing to give him
22 some of this. Talk about what you're willing to give
23 him. If you can't agree to it, that's fine. That's
24 what I'm here for. And then we'll be back here in
25 about ten minutes.

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1 MS. OTTINGER: All rise. Court's in
2 recess.

3 (OFF THE RECORD.)
4

5 MS. OTTINGER: Come to order and be seated.
6 Court is now in session.

7 THE COURT: Sorry for the delay there. I
8 had one or two other matters. All right then. Let's
9 hear -- the next motion is the Motion to Strike
10 Surplusage in the indictment. And let me make an
11 observation first before we spend a lot of time
12 arguing because it might, it might affect your all's
13 position on this.

14 It's my understanding in dealing with Judge
15 Greer and when I was a practicing lawyer and as a
16 magistrate judge now, on a case of this nature where
17 the indictment is as long as it is, I don't believe
18 he's going to read the indictment or give it to the
19 jury. Let me ask Mr. Harker. Is that your
20 understanding, too?

21 MR. HARKER: Your Honor, I don't know the
22 answer to that question.

23 THE COURT: I think he summarizes the
24 allegations and the counts. He goes through and does
25 that for them and then has a special verdict form

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1 before him, and I don't think he'll be presenting the
2 indictment to the grand jury at all.

3 MR. BOSCH: Your Honor, Don Bosch for what
4 limited enlightenment I can provide. I think you're
5 correct about what Judge Greer does even on medium
6 sized indictments. This is a large one. He'll
7 summarize it and then give the appropriate
8 instruction in verdict form to the jury.

9 THE COURT: Yeah. That's what I -- that's
10 my understanding, too. So that might help you a
11 little bit because I think that may be a moot issue
12 in some of these ideas of striking surplusage in the
13 indictment, but go ahead.

14 MR. KEHOE: Yes, Judge. It may with some
15 of the ancillary matters that go towards the end of
16 the brief, but to the extent that, for instance, we
17 have money laundering items set forth in the
18 indictment and...

19 THE COURT: Why don't you go ahead and
20 argue that?

21 MR. KEHOE: Okay. Obviously, we're arguing
22 this under 7B, Judge, and throughout the indictment
23 there are comments about the movement of money that
24 is described as money laundering, the traditional
25 money laundering. I know money laundering is a very

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1 loaded term and goes directly to Section 1956 and
2 1957.

3 THE COURT: But if it's part of the
4 conspiracy is what they're saying. is that not
5 relevant?

6 MR. KEHOE: No. If -- what he's saying is
7 that they are moving money to somehow conceal it.

8 THE COURT: Right.

9 MR. KEHOE: Okay. That -- can they argue
10 that they're moving money to conceal, where that
11 money came from, etcetera? They can argue that, but
12 to call it something that is a separate crime, i.e.,
13 money laundering without going through what money
14 laundering is because this under 1956 or 1957 is
15 neither a financial transaction or a monetary
16 transaction, and I am sure that the initial elements
17 of 1956(a)(1) are not set forth in this indictment
18 and certainly nothing in 1956(a)(1) nor, of course,
19 (a)(2), nor is it in 1957. So what we're doing here
20 is without going through this definable term, money
21 laundering, which is under 1956 and 1957 well laid
22 out and case law is replete on it, the government
23 just throws it in there like a little hand grenade
24 throughout it all to say, "Look," because they know
25 full well -- they know full well that a jury is going

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1 to react to money laundering, although there is no
2 crime set forth in this indictment on money
3 laundering. Now there is no charge. I suspect that
4 counsel decided not to bring a money laundering
5 charge or the money laundering section of the
6 Department of Justice declined to allow the U. S.
7 Attorney's office to bring a 56 or 57 charge. Be
8 that as it may, it's not there, but it's still in
9 there as these little mine fields without anything
10 else other than this description that is intended to
11 prejudice the jury and doesn't advance any knowledge
12 for the jury because money laundering, qual
13 (phonetically) money laundering under 1956 and 1957
14 is simply not listed as one of the charges. I mean
15 we know why the government's put that in there,
16 Judge. We know full well that it is there to alarm
17 the jury that this is somehow a money laundering
18 issue when it's not. If they want to argue during
19 the course of the evidence and argue from the
20 evidence that somehow the defendants concealed money
21 or moved money, well, that's the evidence that comes
22 in. But to describe it as money laundering is
23 improper. It would be the function -- why not just
24 put embezzlement through all this even though you
25 don't have an embezzlement charge or some other, you

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1 know, volatile description. That's what's going on
2 here. That's why they're doing this, and that's why
3 the courts take those terms and they strike them
4 because of those particular reasons. There's no
5 charge of 56 or 57 charge. There's no laying out of
6 the elements of 56 and 57, 56 under (a)(1) or (a)(2),
7 certainly not (a)(2) because it's international, but
8 under (a)(1) and certainly nothing under a 1957
9 charge to allow any jury to come to a conclusion
10 about money laundering, which, of course, is
11 indicative of the fact as to -- or why, I should say,
12 the government didn't bring a 56 or a 57 count. And
13 that's the reason it's there.

14 THE COURT: So when Judge Greer summarizes
15 it, it may be -- it is your position that he should
16 summarize it and say that they were money laundering?

17 MR. KEHOE: What I'd say to the judge is
18 that what is to preclude Mr. Harker from standing in
19 front of the jury and say, "Well, on Paragraph such
20 and such of the indictment it describes money
21 laundering when the defendants at X, Y and Z, and
22 it's right here in the indictment, right here hands
23 down by the grand jury."

24 THE COURT: They won't have it. They
25 won't have the indictment.

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1 MR. KEHOE: Yeah. But he can still read
2 it. He can still refer to something that is in the
3 indictment. Whether or not they have it, I mean both
4 sides will refer to the charging document during the
5 course of both opening statement and closing. So...

6 THE COURT: Okay. All right. So you want
7 money laundering struck out?

8 MR. KEHOE: Yes.

9 THE COURT: All right.

10 MR. KEHOE: Money laundering is stricken
11 out. I mean the other issue that is perplexing, of
12 course, is something I alluded to during the argument
13 on the Bill of Particulars, and that has to with the
14 inflated AWP's. These defendants, regardless of the
15 allegations, have nothing to do with setting the
16 average wholesale price. That is set by third
17 parties, and when a particular item comes into a PBM,
18 it auto-populates that with what the AWP is.

19 THE COURT: So what do you want me to do
20 with that?

21 MR. KEHOE: Strike that because it's...

22 THE COURT: Strike it anywhere it says
23 AWP?

24 MR. KEHOE: Of course.

25 THE COURT: And what goes in its place?

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1 MR. KEHOE: That's something that the
2 government asked because what they have done is they
3 have decided to, mistakenly or whatever, they have
4 decided to incorporate a definition in here, AWP,
5 which doesn't exist, and lay it at the feet of these
6 defendants when they have nothing to do with the AWP.

7 THE COURT: I think your argument is that
8 AWP is inflated and AWP is a misnomer because they
9 actually bought it at a discount from the AWP and
10 they got reimbursed in the AWP records. Is that
11 right?

12 MR. KEHOE: No, Judge. What I'm saying to
13 you is that the term "inflated AWP" is just wrong.

14 THE COURT: Well, what is -- well, I mean
15 if you agree, agree -- my understanding is your
16 argument we have agreed was that the reason it was
17 wrong is because in actuality we got a discounted AWP
18 rate and then got reimbursed at an AWP rate. Is that
19 right or wrong?

20 MR. KEHOE: No, not necessarily, no.

21 THE COURT: Well, correct me on that.
22 What's your position?

23 MR. KEHOE: The wholesaler buys a product,
24 whatever the product happens to be, and they sell it.
25 There's an AWP for this product. The PBM's don't pay

1 the AWP. Why? They pay something less because
2 they're making a profit. So they're not going to pay
3 out at the AWP. But what that AWP is set at is set
4 by a third party. It's the functional equivalent of,
5 you know, changing the interest rate for the Fed. I
6 mean you just can't...

7 THE COURT: Will you argue that to the
8 jury then? Can you just say, "Well, this is what
9 their whole theory of the case is. It's a shame
10 because they've got their whole charge going on, and
11 here, this is how in actuality the AWP works"? Why
12 isn't that a factual issue that...

13 MR. KEHOE: Well, the reason is, Judge, it
14 is not only relevant, but it is prejudicial. If...

15 THE COURT: Well now, what do you mean?
16 How is that, you arguing that the way the government
17 has -- how is that prejudicial? I'm not...

18 MR. KEHOE: Because the government is
19 advancing a term which categorically is incorrect.

20 THE COURT: Okay.

21 MR. KEHOE: The government is advancing
22 something in there that we have to talk to you about
23 here, Judge, that is just wrong - with some argument
24 that these defendants had something to do with
25 setting the AWP, and they do not. They have nothing

1 to do with it. And you add onto that that they made
2 money by inflating the AWP is clearly more
3 prejudicial. So you take something about which they
4 have no control, and then you add the adjective
5 "inflated" to it - again, something like money
6 laundering - to inflame the jury. Not only are you
7 laundering money, you're inflating the AWP. I mean I
8 think it's incumbent upon...

9 THE COURT: But the defense to it is we
10 had nothing to do with that.

11 MR. KEHOE: Well, certainly, Judge --
12 certainly, Judge, there is an argument similar to the
13 argument that I'm making to you, but I do think that
14 moving ahead with the charged indictment, for the
15 Court to consider something that's in this charged
16 indictment that is incompletely wrong is just
17 incorrect.

18 THE COURT: Okay.

19 MR. KEHOE: That's causing something that
20 -- an inflated AWP and putting it at the feet of
21 these defendants is just completely wrong, and
22 allowing that to move forward, as we move forward in
23 this -- so we have to address it in front of the
24 jury. First of all, Your Honor, it's unnecessary.
25 Secondly, it's an irrelevant allegation given the

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1 fact that they had nothing to do with it. Thirdly,
2 similar to having the government argue money
3 laundering is prejudicial...

4 THE COURT: Okay.

5 MR. KEHOE: ...to have it ringing around
6 with the jury that this inflated AWP is in the
7 indictment.

8 THE COURT: Okay. All right. So knock
9 out the inflated AWP, the money laundering.

10 MR. KEHOE: And there is the last issue,
11 Judge. There's any number of comments that are set
12 forth, you know, in the indictment that make this
13 indictment appear, you know, like it's global. You
14 know, there are no holds barred here. You know,
15 protect your little ones because here comes this
16 conspiracy, that it's known an unknown, and it's
17 people, other people involved, other pharmacies, and
18 it's happening elsewhere, and they're involved in a
19 variety of schemes. There are a number of items that
20 we listed in our motion that clearly are put in the
21 grand jury simply to expand this out well beyond what
22 this case actually is, which is interesting because
23 even while they're putting these expanded things out
24 like there's a variety of schemes in '76, and this
25 happens, it's happening elsewhere. You know, in

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1 Paragraph 1, 32, 94, 96, 98, 100, all those issues
2 which, you know, are in the indictment that we're
3 trying to get some Bill of Particulars on, but
4 nevertheless, it's still in the indictment. So there
5 has to be some consideration, Judge, of striking
6 those items about which it gives a misperception of
7 the range and scope of this conspiracy.

8 THE COURT: And just so that I understand
9 what you're saying, you're referring to the
10 specifics, the specific items that you're asking me
11 to strike?

12 MR. KEHOE: Right.

13 THE COURT: I believe is the...

14 MR. KEHOE: We have them listed in there,
15 Judge.

16 THE COURT: Yeah. Among other things...

17 MR. KEHOE: Right.

18 THE COURT: ...and you have them listed on
19 Page 9 of Document 104 as to exactly what you want...

20 MR. KEHOE: Correct, Judge.

21 THE COURT: ...struck as far as other
22 persons and entities known and those kind of things?

23 MR. KEHOE: Yes, Your Honor.

24 THE COURT: Okay. I see what you're
25 saying.

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1 MR. KEHOE: Okay. That's -- without
2 belaboring the point, Judge, that's the argument.

3 THE COURT: Perfect.

4 MR. KEHOE: I'll turn it over to my
5 colleagues unless anybody else has anything.

6 THE COURT: If anybody else would like to
7 argue, you certainly can. I'm not going to...

8 MR. SUAREZ: Judge, I'm still blown away by
9 his argument. Thank you.

10 MR. ____: Nothing here, Sir.

11 MR. ____: Nothing, Your Honor. Thank you.

12 MR. ____: No, thank you.

13 THE COURT: All right. Mr. Harker -- I
14 mean Mr. Roach. Were you equally blown away by the
15 argument?

16 MR. ROACH: Yes, Your Honor. I'm blown
17 away. Good morning, Your Honor. Bill Roach from the
18 Knoxville office. I'll go straight to the money
19 laundering allegations in the indictment. Your
20 Honor, as I pointed out in our response to the
21 motion, that allegation to money laundering is
22 relevant to the conspiracy. It shows that the
23 defendants were attempting to conceal their purchases
24 of the medications and the reimbursements. They were
25 trying to conceal that from the pharmacy. To do

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1 that, they had to implement and devise a money
2 laundering scheme so that the PBM's did not discover
3 that the patients were not paying the co-pays. Okay?

4 THE COURT: Well, did the PBM's audit them?
5 What was the real point behind them needing to
6 conceal?

7 MR. ROACH: That's exactly right, Your
8 Honor. The PBM's could audit them. The PBM's did
9 audit them, and the PBM's did eventually terminate
10 some of the pharmacies for that specific issue, and
11 that's what we intend to prove at trial.

12 THE COURT: Okay.

13 MR. ROACH: So that we're going to show
14 that this money laundering scheme that the defendants
15 developed, that the intent of that scheme was to
16 deceive the PBM's, Your Honor.

17 THE COURT: They make a point that, "Well,
18 does it -- you did indict him for money laundering,
19 and, therefore, you shouldn't be able to say that
20 that money was laundry money." That looks like the
21 essence of one of their arguments.

22 THE COURT: That is, Your Honor, but with
23 all due respect, that misapprehends the legal
24 standard here. The Sixth Circuit has set down the
25 legal standard where if we have an allegation in the

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1 indictment, if that allegation is relevant and we
2 intend to prove it, then it cannot be stricken under
3 the Sixth Circuit deprescuit (phonetically). It has
4 to be both irrelevant, and it has to be prejudicial.
5 Now we don't even get to the prejudice inquiry here,
6 and that's what the Sixth Circuit has held in the
7 cases that I cited in my response because the
8 allegation of money laundering is relevant, Your
9 Honor. And that argument, moving into the second
10 point, only inflated AWP medications. That applies
11 equally to the inflated AWP, to that allegation. We
12 included that in the indictment because that's
13 exactly what we intend to prove at trial. We intend
14 to prove that the conspiracy set out to -- or part of
15 the conspiracy was to set out to isolate these
16 medications where the AWP price was spread between
17 the AWP and the usual and customary price at which
18 the pharmacies paid for the medications. The
19 defendants isolated the medications that had the
20 highest spread. That's what we're going to show at
21 trial. That's what we allege in the indictment, and
22 because that allegation is relevant, because it shows
23 that the purpose of the conspiracy was financial
24 gain, that's the relevance of the inflated AWP
25 medication, the allegation in the indictment, Your

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1 Honor.

2 THE COURT: Okay. So you've heard the
3 defendants say that this inflated AWP, there was no
4 such thing. It's a wrong term. What's your response
5 to that?

6 MR. ROACH: Your Honor, I would say two
7 things. I would say, Number 1, it's not a wrong
8 term. It's exactly what happened here. The word
9 "inflated" is just our description of the difference
10 between the AWP price, which is an industry-reported
11 price, and the usual and customary price. Now we're
12 going to show that the medications that they selected
13 that they isolated, that they test built for, that
14 they fished for -- we're going to show that the
15 spreads on those medications were some of the highest
16 spreads that you could find in the pharmaceutical
17 industry. Okay? That's why those -- that's why we
18 say that it's an inflated AWP, because the AWP price
19 is inflated over the usual and customary price, Your
20 Honor. That's why it's relevant, because it shows
21 that the intent of the conspiracy was financial gain.

22 Now to the second point...

23 THE COURT: Is that, is that illegal? I
24 mean is that -- what I'm trying to figure out is if
25 you have -- they don't set the AWP price?

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1 MR. ROACH: That's correct.

2 THE COURT: Okay. So we've got that set
3 out there by a third party, and then they -- it looks
4 like your allegation so I'm understanding...

5 MR. ROACH: Right.

6 THE COURT: You've got the -- what your
7 allegation is the defendants go and find those
8 particular medications that have these third party
9 established AWP's and then compare them to the
10 normal, customary reimbursements?

11 MR. ROACH: Right.

12 THE COURT: Is that right? And then if
13 they're large enough, they'll encourage the doctors
14 or however that scheme would be...

15 MR. ROACH: That's correct.

16 THE COURT: ...we will get them to
17 prescribe these medicines...

18 MR. ROACH: Right.

19 THE COURT: ...because we're going to make
20 a big...

21 MR. ROACH: Well, Your Honor, there's
22 nothing inherently illegal about trying to make a
23 profit.

24 THE COURT: Right.

25 MR. ROACH: But if you deceive doctors, if

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1 you deceive patients, if you deceive the PBM's into
2 reimbursing for medications that were not necessary,
3 that the patients didn't want, that the doctors
4 didn't know that the patients were requesting certain
5 medications, that's where it turns into what we
6 allege in the indictment, Your Honor. And so that's
7 -- and that's exactly why the allegation of an
8 inflated AWP medication is relevant, Your Honor.

9 THE COURT: Okay.

10 MR. ROACH: Unless Your Honor has any
11 further questions about the third category, I would
12 just say that none of those allegations, Your Honor,
13 in the indictment are prejudicial. The conspiracy --
14 we do mention others unnamed by the grand jury. I
15 think that's customary practice, for the grand jury
16 not to name unindicted co-conspirators in the
17 indictment. And there was some argument about that
18 during the Bill of Particulars when Your Honor was
19 asking questions about the Bill of Particulars
20 motion, Your Honor, but I think the underlying point
21 for our case in the Motion to Strike is that none of
22 those, none of those allegations, none of the
23 inclusion about language the indictment is
24 prejudicial, Your Honor, and for that reason, the
25 motion in its entirety should be denied.

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1 THE COURT: Okay.

2 MR. ROACH: Thank you.

3 THE COURT: All right. Thank you, Mr.

4 Roach.

5 MR. KEHOE: May I respond briefly, Judge?

6 THE COURT: Absolutely.

7 MR. KEHOE: We go back to the money

8 laundering aspect first, Judge. I mean, yes, the

9 Sixth Circuit case said, you know, if it's

10 prejudicial, it shouldn't be stricken. Most

11 indictments are prejudicial, Judge. I mean let's be

12 frank. I mean people aren't there for, you know,

13 going to the spa. You know, they've been indicted

14 for something. So it's per se prejudicial, but it's

15 got to be relevant. And what they're arguing is that

16 they are saying that this money was concealed and

17 concealed from the PBM's, and they're calling it

18 themselves money laundering, and it's not money

19 laundering. If you look at 1956 and 1957 as Congress

20 has defined it, it is not money laundering. And what

21 they're trying to do is put a round peg in a square

22 hole. We're not before Your Honor advancing the

23 theory that we want to put a fence around the

24 government's evidence on concealment; that they were

25 concealing where money was going for whatever reasons

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1 the government is advancing.

2 THE COURT: Well, let me ask you. What is
3 money laundering?

4 MR. KEHOE: Well, it's a variety of
5 different things. 1956 is the taking of specified
6 unlawful proceeds and using it to advance that
7 specified unlawful activity, to evade taxes or to
8 otherwise promote the activity.

9 THE COURT: So if you had specified
10 unlawful activity for fraud...

11 MR. KEHOE: No. It's got to be -- yeah.

12 THE COURT: ...I mean would that be --
13 would that -- it looks like to me that's what this
14 conspiracy is about is fraud; that they're saying
15 that, hey, they got this money from a specified,
16 unlawful activity is what Mr. Roach has described,
17 and then try to secrete the money from being, you
18 know, being detected based on the audits that the
19 PBM's were engaged in.

20 MR. KEHOE: Well, let's stop at the first
21 thing. What the SUA is in those proceeds, you have
22 to prove that the proceeds are, in fact, coming from
23 a specified, unlawful activity.

24 THE COURT: Okay.

25 MR. KEHOE: You have to prove that. That's

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1 Step 1. And then you have the promotion, tax and
2 moving on the ongoing activity of the enterprise. So
3 I mean all of those issues -- just identifying that
4 information is, is required. You've got to say this
5 is from SUA. Why is that important? Why is that
6 important? Because it ain't true, which is also
7 money laundering. I'm talking about 1956(a)(92). You
8 don't have to have money from a specified, unlawful
9 activity. 1956(a)(2) only requires that money be
10 moved nationally or internationally across borders
11 and that that money is used to promote. So that's
12 much different between (a)(1) and (a)(2). So it's
13 the defining and being able to prove not only the
14 SUA, specified unlawful activity, pardon the acronym,
15 the SUA, but that these are proceeds from the SUA
16 before you take the additional steps. It's crucial
17 depending on whether or not it's an (a)(1) or (a)(2).
18 They don't do that. They just call it money
19 laundering and say, "Hey, this is money laundering.
20 Why? Because you guys are taking money, and you're
21 concealing it from the PBM's." If I make money
22 legitimately and I'm concealing it from the PBM, is
23 that money laundering? No. Clearly, clearly on the
24 worst case scenario because it's not an SUA. It's
25 not, you know, proceeds from a specified unlawful

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1 activity. You know, Judge, this isn't complicated
2 stuff. You know, I spent the good majority of three
3 years dealing with just putting these statutes
4 together and willy-nilly just talking about what
5 something is, a SUA and the proceeds and promotion,
6 etcetera under 56(a)(1) and 56(a)(2) is an
7 evidentiary derivative product, and they don't have
8 it. What they want is some kind of sizzle factor.
9 They want to cost this -- they want to call this
10 money laundering without charging it and without
11 going through all the elements, but they want to come
12 in here and argue that somehow somebody concealed
13 some money from them. You know, I don't think at
14 this point -- during this point -- we can argue that
15 at trial, but at this point there's no, there's no
16 basis upon which for us to curtail the concealment
17 argument...

18 THE COURT: Okay.

19 MR. KEHOE: ...as evidence of a conspiracy.
20 But calling it money laundering, qua money laundering
21 on a 1956 or a 1957, for that matter, which, you
22 know, we haven't really talked about that much. It
23 is a much more complex matter concerning the source
24 of those proceeds and what those proceeds are
25 designed to do as required by the statute, and they

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1 haven't done it. They just want to throw these
2 little hand grenades in throughout the course of this
3 indictment to prejudice defendants and have the
4 jurors if they ever hear it, when they read this
5 during opening and closing, "Oh, my heavens to Betsy,
6 there is money laundering going on. On top of
7 everything else, they're money laundering." That's
8 the reason for it, Judge. That's the reason for it.
9 That's inflated, inflated AWP. Counsel said inflate
10 it over customer improper. What does that mean?
11 Inflate it over customer improper. Customer
12 improper? We didn't even set the AWP. These
13 defendants have nothing to do with the AWP. Your
14 Honor hit the nail on the head. AWP and the PBM's
15 are auto-populating the purchase based on that AWP,
16 and they're buying money -- buying the product and
17 making a profit based on that. That's America.
18 That's not a crime. They don't set the AWP. If
19 they're not setting the AWP, how can they inflate it?
20 And that's what they're charging in the indictment.
21 If they want to come up with some other scheme that
22 they did something wrong with that, that's fine, but
23 it's got nothing to do with the definable term of
24 AWP. If they don't have anything to do with it,
25 certainly they can't inflate it. That's basically --

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1 and then, of course, Judge, that does not, again, put
2 a fence around I'm sure the argument that they're
3 going to advance, that doctors were deceived and
4 other people, patients were deceived, etcetera.
5 That's a different factual, evidentiary scenario.
6 We're just talking about this misuse of terminology
7 that is not only prejudicial. It's extremely
8 irrelevant.

9 THE COURT: Okay.

10 MR. KEHOE: Thank you.

11 THE COURT: Thank you. Does anybody else
12 want to be heard on rebuttal for that?

13 MR. SUAREZ: No, Your Honor. Still blown
14 away.

15 THE COURT: All right. Well, that will
16 conclude the hearing, I believe. Anything else that
17 needs to be brought up?

18 MR. FOSTER: Yes, Sir. Mr. Harker and I
19 did have the opportunity to discuss that issue.

20 THE COURT: Yes. Yes. Tell me about
21 that.

22 MR. FOSTER: And I think Mr. Harker will
23 explain to the Court what we discussed.

24 THE COURT: Okay.

25 MR. HARKER: Your Honor, two points to Mr.

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1 Bosch's points. One of them, I just want to make
2 sure that the defendants understand in the indictment
3 that the reason these patients' initial are automized
4 has nothing to do with us preventing -- we're happy
5 to provide them a list of who these patients are.

6 THE COURT: Okay.

7 MR. HARKER: That's only because it's
8 protected health information.

9 THE COURT: Right.

10 MR. HARKER: On the issue that Mr. Foster
11 raised, the government's position is that there is a
12 difference between the unindicted co-conspirators who
13 make up the balance of the \$174 million on the one
14 hand and all of the unindicted co-conspirators. And
15 in particular, there's one person who should probably
16 have been indicted as part of this conspiracy because
17 he's on one of these two spokes. He doesn't happen
18 to be on Mr. Foster's spoke. He happens to be on Mr.
19 Smith's spoke. That person is the subject of an
20 ongoing investigation. I think everybody in this
21 room probably knows who that person is. The
22 government is willing to identify by name the
23 entities and persons who make up the balance of the
24 \$174 million to all the defendants. We are not
25 willing to identify the name of that person to make

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1 it explicit as to who is the subject of an ongoing
2 investigation, and that person is not responsible for
3 any more money.

4 THE COURT: Okay.

5 MR. HARKER: If that makes sense.

6 MR. KEHOE: With all due respect, Judge, I
7 look forward to be enlightened because I represent
8 Mr. Smith, and I don't know who he's talking about.

9 THE COURT: All right. Very good. All
10 right. So you're going, you're going to provide the
11 ones that you agree to provide except for that one
12 individual?

13 MR. HARKER: Yes, Your Honor. The one that
14 we -- when we say unindicted co-conspirator, what I'm
15 talking about is people that the government believes
16 that we could prove a case against with the evidence
17 we know about now.

18 THE COURT: Okay. Mr. Foster?

19 MR. FOSTER: Yes. If he's going to provide
20 that description of individuals, I think that
21 satisfies my request.

22 THE COURT: Okay. All right. Okay.
23 Anything else we need to take up? I appreciate your
24 all's time. It's 11:25, and appreciate the argument
25 and your all being here today.

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ALL: Thank you, Judge.

MS. OTTINGER: All rise.

THIS COMPLETES ALL MATTERS PRESENTED IN THIS HEARING.

Exhibit No. 1, Excel Record and Key, Evidence Folder
Contents.

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Exhibit No. 2, Three printouts of screen shots, phone
numbers.

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Exhibit No. 3, Subpoena, Synergy Recordings, Batch 8.

Exhibit No. 4, Synergy Recordings, Batch 8
(3166485998).

CERTIFICATE

I, C.D. Neal, Notary Public and Court
Reporter, Barringer Court Reporting, hereby certify
that the foregoing is a true and complete Transcript
of the Motion Hearing in the case of UNITED STATES OF
AMERICA versus ANDREW ASSAD, ET AL as heard in United
States District Court, Eastern District of Tennessee
at Greeneville on the 3rd day of April 2019.

WITNESS my hand and official seal at office
at Gray, Tennessee, this the ____ day of _____,
2019.

BARRINGER COURT REPORTING

By: 


NOTARY PUBLIC

My Commission Expires: September 30, 2020.

Barringer Court Reporting
P.O. Box 8035, Gray, TN - 423-477-7844